IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Writ Petition No. 1658 of 2006

Narendra Purshottambhai Umrao ..Petitioner

vs.

Naimuddin Sarfuddin Khan ..Respondent

Shri C.G.Gavnekar for petitioner.
Shri M.D.Angal for respondent.

CORAM: S.B.MHASE J.
4th April, 2006

P.C.

1. Rule. Returnable forthwith by consent of the parties.

2. The order dated 25th January, 2006 passed by the Civil Judge, Jr.Dn., Murud below Exh.28 from Reg.Civil Suit No.22 of 2005 is under challenge. The petitioner is the original plaintiff in Reg.Civil Suit No.22 of 2005 filed in the Court of Civil Judge, Jr.Dn., Murud. The said suit has been filed by the plaintiff/petitioner seeking a declaration that the defendant has no right to put up structure in land bearing Gat No.186 Mouje Sarve, Taluka Murud, District Raigad or to construct road on the said creek or abutting on the said creek from Gat No.186 and further a permanent injunction was claimed restraiaining the defendant/respondent from putting up any construction on the said plot of land bearing Gat No.186, Mouje Sarve and/or from constructing road leading from Gat No.186,

Mouje Sarve and/or from constructing road leading from Gat No.186 on the said creek or abutting the said creek. In the said suit application Exh.5 has also been filed for temporary injunction and the Trial Court has granted the order of status quo and yet that application is to be heard. The application at Exh.28 is filed seeking amendment in the plaint and the said application is rejected. Therefore, the petitioner/original plaintiff is before this Court.

3. It is the case of the petitioner/plaintiff that Gat Nos.200, 202, 203, 204, 187, 188, 189, 190, 191, 192, 193 and 194 are the properties of the petitioner and all these properties being adjacent to each other they form one compact property. On the western side of the property of the petitioner/plaintiff there is property Gat No.186 belonging to the defendant and beyond Gat No.186 there is sea. The petitioner/plaintiff has averred in para 2 of the plaint that during high tide water of creek or sea water enters from the western and northern side of the said property and after some time during low tide the said water recedes from the petitioner’s property. During rainy season the water collected in the petitioner’s property is drained, discharged and goes away in the said creek from West and North side of the said property and that the petitioner is enjoying the natural right of draining and discharging the rain water from his property

in the creek all through out without any disturbance from any one. Thus the petitioner/plaintiff claims easementary right. It has further been stated in para 3 of the plaint that as Gat No.186 is in CRZ zone and the construction is not permissible in the said Gat number. In para 6 of the plaint, the petitioner/plaintiff has averred that in the event the respondent/defendant puts up structure on the said land and constructs the road the same will adversely affect the flow of water in the said creek and create a bottleneck during high tide water and restrain the water from discharging in the said creek and, therefore, the petitioner/plaitniff claimed a declaration and injunction.

4. By application Exh.28 the petitioner/plaintiff proposed the following amendment by inserting para (1A) and 2(A) in the plaint and injunction application.

> "1A) The suit property means the Gat No.186 of Mouje Survey owned by the defendant, the creek (creek) where the sea water comes in, during the highest high tide and the land where the man grows (naturally grown bushes and small trees) are which is also touching to the Gut 187, 188, 190, 191, 200, 202, 203, 204 of Mouje Survey owned, possessed and occupied by the plaintiff. It is claimed by the defendant that some part of the Gat No.186 of Mouje Survey in the form of strip is on the

northern side of plaintiff's properties. Most of this strip is in the creek where the sea water comes in during the highest high tide time. Even in this situation plaintiff is claimed the relief claimed in this present suit (plaint and the injunction application) by the plaintiff.

2A) Ram water of Mouje Survey, some land of Mouje Kashid and rain water of forest mountains surrounding these villages (i.e. on Southern and Eastern side of these villages) is naturally being drained in to the sea through only this one creek In the past even without any obstruction in the creek heavily rained water overflowed over the Salav Murud road which is situated on the eastern side of the plaintiff's properties and that over flown rain water passes through the plaintiff's properties and naturally drains in to the sea through only this one Khadi. If the water flow of this creek is disturbed the rainwater will clog into the plaintiff's properties and damage the plaintiffs properties and other assets in it. Resulting into irreparable losses to the plaintiff which cannot be paid by any compensation."

3) and as the man grows play an important role in eco systems if the man grows are damaged or its

growth/regeneration is disturbed it’s all the other bad effects will be threatening to all and plaintiff".

All these amendments were opposed by the respondent/defendant. It appears that similar application was earlier filed but it was withdrawn with liberty to file fresh one and on that count the present application is also opposed. However, in para 5 of the defendant’s reply to the amendment application, it is stated by the defendant that "by allowing the amendment the cause of action in the suit is liable to be changed. Plaintiff has failed to describe the suit property in the plaint and the plaintiff is now claiming amendment, the same cannot be allowed." The respondent further stated that the petitioner/plaintiff is liable to file fresh suit for the said purpose and the same is the position in law and in order to get rid of the said question the plaintiff has preferred the present amendment application which is strongly opposed. After hearing the parties the Court has passed the impugned order.

5. It is to be noted that the Trial Court has stated that the subject matter of the suit is the immovable property and the same is required to be described sufficiently in the plaint so as to identify it and it can be identified by survey numbers, boundaries of numbers in record of

rights and they may be described in such a way. Prayer clause (a) of the plaint seeks a declaration against the defendant relating to Gat No.186 and also regarding the Khadi adjoining Gat No.186 and the amendment sought is also relating to both the Gat Number and the creek and creek is not the private property. Neither it has any survey number or boundary or any number in the right of record to identify. It is a Government property and, therefore, amendment is rejected.

6. Ex facie the reasoning adopted by the Trial Court is wrong and erroneous. The Court has lost sight of the fact that the land survey no.186 is located towards Western and Northern side of the plaintiff's property and the high tide and rain water from the land of the plaintiff naturally flow to sea or creek through land Gat No.186 and thus the plaintiff has claimed customary easement through the land of the defendant. The main suit is for such relief and the averments are already there. The proposed amendment was suggested only to elaborate the subject matter of the main suit. By this amendment no new case is made out and apart from that at initial stage such amendment has been proposed. Therefore, it cannot be said to be at belated stage. It requires to be mentioned that the Trial Court has not rejected the amendment on the ground that it introduces a new cause of action nor it is at belated stage. It is rejected only on the ground that

the State Government is necessary party. It is to be noted that it is not the case made out by the petitioner/plaintiff that the State is carrying out any construction in the creek. It is the case of the petitioner that the defendant is likely to carry out or is carrying out any construction in Gat No.186 which is located on the Western Side of the plaintiff's land and if such construction is carried out it is likely to affect the enjoyment of the property of the plaintiff because of result of such mischief water in high tide and rain water will accumulate in the land of the plaintiff and and it will prevent the natural draining of water and ultimately the plaintiff will be unable to enjoy his immovable property and to elaborate this position amendment is proposed. No relief has been claimed as against the Government and not only that no relief in respect of the property of the Government has been claimed. It is only pointed out that the defendant is likely to construct not on survey no.186 but also encroach upon the creek water and that will also ultimately affect the petitioner. It is this action of the defendant which is tried to be restrained being the owner of Gat No.186 and being adjacent to creek. The court has lost proper perspective of the matter and has erroneously for improper reasoning has rejected the amendment. In fact such amendment was very much necessary to elaborate the subject matter. The learned counsel pointed out about the amendment to Rule 17

of Order VI which state that the "Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." The Court lost sight of the fact that by this amendment real question between the parties will be elaborated. Viewed from any angle the order is bad and requires to be set aside and is accordingly set aside. The writ petition is allowed. The order passed below Exh.28 ind Reg.Civil Suit No. 22 of 2005 is hereby quashed and set aside. Application at Exh.28 is allowed. The plaintiffs shall carry out the proposed amendment within a period of two weeks from the receipt of this order by the Trial Court. The defendant is at liberty to file additional written statement on the amended plaint within a period of four weeks thereof.

(S.B.MHASE J.)